

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 17, 2007

STATE OF TENNESSEE v. WILLIAM B. FRANCIS, JR.

**Appeal from the Criminal Court for Davidson County
No. 2005-C-2419 J. Randall Wyatt, Jr., Judge**

No. M2006-02177-CCA-R3-CD - Filed November 30, 2007

The defendant, William B. Francis, Jr., originally charged with first degree premeditated murder, was convicted of second degree murder and sentenced to 25 years' incarceration. In this appeal, he asserts (1) that the trial court erred by admitting certain evidence, (2) that the trial court erred by instructing the jury on flight, and (3) that the sentence is excessive. Discerning no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Jonathan F. Wing and Tyler Chance Yarbrow, Assistant District Public Defenders (at trial), and Emma Rae Tennent, Assistant District Public Defender (on appeal), for the appellant, William B. Francis, Jr.

Robert E. Cooper, Jr., Attorney General & Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Katrin Miller and Christopher Buford, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The defendant was convicted of second degree murder for the stabbing homicide of his girlfriend, Davenia Grant, on July 2, 2005. According to witnesses, the victim visited the defendant at the halfway house where he had been living for several months. The two went into the defendant's room, and witnesses then heard sounds of a struggle coming from the room. Johnny Campbell and Raymond Perez, residents of the halfway house, inquired into the well-being of the defendant and the victim, and the defendant responded that everything was "fine." Both Mr. Campbell and Mr. Perez confirmed that they heard the victim tell the defendant, "Stop." A short time later, Mr. Perez heard the defendant in the kitchen and then saw him move the victim's car to the opposite side of the street. He then told Mr. Perez, "[W]e're leaving," and left in the victim's car alone.

When Mr. Perez realized that the victim did not leave with the defendant, he went into the bedroom to check on her. He eventually saw her body in the defendant's closet wrapped in blankets. Mr. Perez testified that he had seen the defendant spread those same blankets on the floor just prior to the victim's arrival. After Mr. Perez alerted Mr. Campbell to the presence of the victim's body, Mr. Campbell telephoned the police and the house manager, Milton McClain.

Lieutenant Aubrey Turner of the Metro Police Department was the first officer on the scene. He was directed to the defendant's closet, where he discovered the victim's still warm body underneath a blanket that had been "folded perfectly." Tennis shoes and other items had also been arranged neatly on top of the victim's body.

Doctor Stacy Turner testified that the cause of death was "multiple sharp force injuries," four of which were stab wounds. Two stab wounds to the neck were "potentially lethal." Doctor Turner classified incisions and abrasions to the victim's face and hands as defensive wounds. Doctor Turner confirmed that the victim was not pregnant at the time of her death. Testing revealed the presence of both parent cocaine and cocaine metabolites in the victim's blood.

Rutherford County Deputy Sheriff David Alford found the defendant sitting in the victim's car in his parents' driveway. Clothing had been rolled up in the windows to form a curtain concealing the interior of the car.

Both Mr. Campbell and Mr. Perez testified that the defendant's relationship with the victim was rocky. Mr. Campbell stated that the defendant displayed "rough" behavior toward the victim while the defendant and the victim were on the telephone. He recalled that after one conversation with the victim, the defendant threatened to "kill that bitch," but no one took him seriously. He conceded that he never heard the defendant communicate any threat to the victim. Mr. Perez, who was the defendant's roommate, testified that he heard the defendant arguing with the victim while on the telephone. Approximately two weeks before the murder, the defendant told Mr. Perez that the victim was pregnant and that he did not believe that they should bring another child into the world. He told Mr. Perez that he was going to kill the victim or cause her to miscarry. The victim's cousin, Marjorie Tyler Grant, also overheard the defendant and the victim arguing on several occasions. She recalled that on the day that the defendant and the victim went to court regarding the order of protection the victim took on the defendant, the defendant told the victim "[I]f I can't have you, no one else can." Over defense objections, the State introduced into evidence a certified copy of the defendant's conviction for assaulting the victim in March 2005 and a certified copy of the order of protection.

Metro Detective Robert Russell interviewed the defendant and recorded his statement. According to Detective Russell, the defendant admitted killing the victim but claimed that he did not intend to kill her. The defendant claimed that the victim pulled a knife on him as they argued about money. He stated that he was able to gain control of the knife and stab the victim.

At the conclusion of the trial, the defendant was convicted of second degree murder. In this appeal, the defendant does not contest the sufficiency of the convicting evidence but

challenges instead the admission of certain evidence, the jury instructions, and the propriety of the sentence.

I. Rule 404(b)

The defendant asserts that the trial court erred by admitting a certified copy of his conviction for assault of the victim, a copy of an order of protection the victim had taken against him, and Mr. Campbell's testimony concerning threats the defendant had made toward the victim. The State contends that the trial court did not err by admitting this evidence. In the alternative, the State submits that even if the admission of the evidence was erroneous, the error qualifies as harmless.

Evidence of other crimes, wrongs, or acts is not generally admissible to prove that an accused committed the crime in question. Tenn. R. Evid. 404. The rationale underlying the general rule is that admission of such evidence carries with it the inherent risk of the jury convicting the defendant of a crime based upon his bad character or propensity to commit a crime, rather than the conviction resting upon the strength of the evidence. *State v. Thacker*, 164 S.W.3d 208, 239 (Tenn. 2005). The risk is greater when the defendant's other bad acts are similar to the crime for which the defendant is on trial. *Id.* at 239; *see also State v. McCary*, 922 S.W.2d 511, 514 (Tenn. 1996).

Notwithstanding the general rule, evidence of other crimes, wrongs or acts may be admissible where it is probative of material issues other than conduct conforming with a character trait. Tenn. R. Evid. 404(b). To admit such evidence, the rule specifies the following:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b)(1)-(4).

In reviewing a trial court's decision to admit or exclude 404(b)-type evidence, an appellate court may disturb the lower court's ruling only if there has been an abuse of discretion. *Thacker*, 164 S.W.3d at 240. Because the trial court substantially complied with the procedural

requisites of Rule 404(b), its decision is entitled to deference. *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997).

A. Prior Assault of the Victim and Order of Protection

As indicated, the State introduced into evidence the misdemeanor assault warrant establishing the defendant's conviction for assaulting the victim in March 2005 as well as a copy of the order of protection the victim obtained against him at that same time. Before admitting the evidence, the trial court, relying primarily upon *State v. Smith*, 868 S.W.2d 561 (Tenn. 1993), determined that the evidence was relevant to the defendant's motive and intent. The trial court concluded that the evidence was also relevant to the hostile nature of the relationship between the defendant and the victim, and that it was proof of the defendant's settled purpose to harm the victim.

Tennessee courts have accepted the use of evidence of a homicide defendant's threats or prior violent acts directed toward the homicide victim as a means of allowing the State the opportunity to establish intent. *Smith*, 868 S.W.2d at 574; *State v. Turnbull*, 640 S.W.2d 40, 46-47 (Tenn. Crim. App. 1982). The courts theorize that such evidence is probative of the defendant's mens rea at the time of the homicide because it reveals a "settled purpose" to harm the victim. *Smith*, 868 S.W.2d at 574. Specifically, this court ruled that "[v]iolent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim." *Id.*

In our view, evidence of the defendant's prior assault of the victim and the order of protection fits squarely within the *Smith* rule. The evidence established the violent nature of their relationship and the defendant's hostility toward the victim. Moreover, given the close proximity in time to the murder, the evidence was highly probative and its relevance outweighed the danger of any unfair prejudice.

B. Johnny Campbell's Testimony

Mr. Campbell testified that in the month preceding the murder, he had observed the defendant behave in a "rough" manner while on the telephone with the victim and had heard the defendant threaten to kill the victim. The defendant contends that the trial court erred by admitting this testimony because the State failed to establish by clear and convincing evidence that the prior acts had actually taken place. He asserts that "Campbell provided no reliable basis for his assertion that the querulous conversations he overheard actually involved the victim."

At trial, Mr. Campbell claimed that he knew that the defendant was talking to the victim because "it was his baby's mom. Okay, that's the way he displayed. He did not give her a name, but it popped on the caller I.D. as Grant. So that spoke for itself." The defense later established through other witnesses that the defendant had no children with the victim and that the victim did not have access to a telephone under the name Grant during the month prior to the murder. Although this proof certainly calls into question the veracity of Mr. Campbell's claims, we cannot

say that the trial court abused its discretion by admitting the evidence. Mr. Campbell contended that the victim was the only woman that the defendant spoke to on the telephone. The trial court, who observed the witness first hand, was in the best position to determine his credibility.

Moreover, any error in the admission of this testimony was harmless. Mr. Perez provided essentially the same testimony regarding the defendant's behavior toward the victim on the telephone and the defendant does not challenge the admissibility of that testimony. Furthermore, the evidence of the defendant's guilt was overwhelming. The defendant is not entitled to relief on this issue.

II. Jury Instruction on Flight

The defendant also asserts that the trial court erred by instructing the jury on flight and the inference of guilt that may be justified from such flight. He contends that the evidence was insufficient to support the instruction. The State argues that the instruction was proper.

During discussion of the proposed jury instructions, the State requested that the trial court provide the standard jury instruction on flight. The defense objected, noting, "We're going to object to flight in this situation. He makes it to Rutherford County at his [parents'] house." After commenting, "What, did you want him to go to, you know, Aruba or something or what?" the trial court ruled that "flight will be included without any doubt."

The trial court has a duty "to give a complete charge of the law applicable to the facts of a case." *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *see also* Tenn. R. Crim. P. 30. To properly charge the jury on flight as an inference of guilt, there must be sufficient evidence to support such instruction. *State v. Berry*, 141 S.W.3d 549, 588 (Tenn. 2004). Sufficient evidence supporting such instruction requires "'both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community.'" *State v. Payton*, 782 S.W.2d 490, 498 (Tenn. Crim. App. 1989) (quoting *Rogers v. State*, 455 S.W.2d 182, 187 (Tenn. Crim. App. 1970) (citing 22A C.J.S. Criminal Law § 625))). Our supreme court has held that "[a] flight instruction is not prohibited when there are multiple motives for flight" and that "[a] defendant's specific intent for fleeing a scene is a jury question." *Berry*, 141 S.W.3d at 589.

In this case, the defendant fled the scene of the murder in the victim's car. He eventually drove to his parents' house in Rutherford County. He had rolled clothes up in the windows to conceal the inside of the vehicle. This evidence satisfies the prerequisites for the giving of the flight instruction. The defendant is not entitled to relief on this issue.

III. Sentencing

Finally, the defendant contends that the trial court erred by imposing the maximum sentence for his conviction. He claims that the trial court assigned too much weight to his prior criminal history and erred by refusing to assign any weight to the five mitigating factors offered by the defendant. The State asserts that the sentence was appropriate.

When a defendant challenges the length of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the defendant. *Id.* If the review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, “even if we would have preferred a different result.” *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the guilty plea and sentencing hearings, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. § 40-35-210(a), (b); -103(5); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

In arriving at the defendant’s sentence of twenty-five years, the maximum within the range, the trial court found that the defendant had a previous history of criminal convictions and criminal behavior that was entitled to great weight. The trial court also found in enhancement that the defendant was on probation at the time of the murder for his prior assault of the victim. The trial court acknowledged in mitigation that the defendant had some “mental issues” and a difficult childhood but ruled that those factors were entitled to little, if any, weight. The court concluded that “the enhancing factors overwhelm the mitigation in this case,” and that “this sentence should be the maximum sentence.”

In our view, the record supports the sentencing decision of the trial court. The presentence report showed that the defendant has a history of criminal convictions spanning nearly twenty years. He has a total of twenty prior convictions, including convictions for assault, battery, child cruelty, theft, drug possession, and vandalism. The defendant’s mother confirmed his history of illegal drug use at the sentencing hearing. Moreover, the record establishes that the defendant was on probation at the time of the murder and that he had previously failed to successfully complete a sentence of probation. Although Doctor Keith Caruso testified that the defendant suffered from Attention Deficit-Hyperactivity Disorder and an unspecified anxiety disorder, we agree with the trial court that this evidence is overwhelmed by the enhancement factors. In consequence, we affirm the sentencing decision of the trial court.

CONCLUSION

The trial court did not err by admitting evidence of the defendant’s prior assault of the victim, the order of protection that she had taken against him, or the threats of violence toward

the victim that he communicated to Johnny Campbell. The trial court properly instructed the jury on flight and the inference of guilt that may be drawn therefrom. Finally, the sentence is not excessive. Accordingly, the judgment of the trial court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE